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IN THE

Supreme Court of the United States

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No. 635. October Term, 1930.

MERCHANTS' WAREHOUSE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and JAMES GALLAGHER, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for Appellant

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BRIEF FOR APPELLANT.

OPINIONS IN COURT BELOW.

The opinion and dissenting opinion are reported in 44 Fed. (2d) 380-392 and also will be found in the Record, pages 30-58.

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with.

STATEMENT OF THE CASE.

This is an appeal by the Merchants' Warehouse Company from a decree of the District Court of the United States for the Eastern District of Pennsylvania, dismissing its bill in equity which prayed for an injunction to restrain the enforcement of a cease and desist order of the Interstate Commerce Commission of the United States issued on the complaint of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and the Terminal Warehouse Company wherein they averred that certain contracts between the Pennsylvania Railroad Company and the appellant for loading and unloading merchandise to and from freight cars were unjustly discriminatory to the complainants and were a device to pay rebates to the appellant as a shipper of the merchandise loaded and unloaded by it into and from freight cars of said carrier. A copy of said complaint will be found in the printed Record, page 112.

The nine contracts between the appellant and the Pennsylvania Railroad Company are in connection with the operation of ten warehouses situate in the City of Philadelphia in different localities convenient for the receipt and delivery of package freight. They are printed in the Record, pages 455 to 526. They are of various dates and are substantially similar in their provisions.

One thereof, dated the 25th, January, 1917 (Record, page 455), runs for the period of twenty years from its date and had for its object the handling and storage of flour, grain and other merchandise in the warehouses situate on the plot of ground bounded by Delaware Avenue, Walnut Street, Water and Chestnut Streets in the City of Philadelphia. The said agreement substantially provides that the Pennsylvania Railroad Company would:

First: (a) Maintain railroad tracks adjacent to the warehouses, do the necessary shifting for the purpose of tak-

ing and delivering all freight cars to be shipped therefrom or destined thereto.

(b) "To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company."

(c) While this contract is in force the railroad will not make any allowance to any other person or corporation for terminal services in connection with loading and unloading of merchandise to or from the warehouses located in the City of Philadelphia.

Second: The warehouse company agreed:

(a) At all times to accord to traffic passing over the railroad company's system, preference in the facilities furnished by the warehouse over traffic passing over other lines.

(b) "To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees and in the case of incoming freight to promptly notify the consignees of the arrival thereof."

(c) To be responsible to the railroad company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the warehouse company to the railroad company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the railroad company may from time to time elect to collect direct from any consignee; the warehouse company to give bond to the railroad company to secure the performance of the contract.

(d) To indemnify the railroad company for all damage to or loss of freights and to keep adequate and sufficient fire insurance.

(e) To promptly notify the railroad company of the failure of any consignee to remove freight.

(f) To indemnify the railroad company against liability on account of acts or omissions of the warehouse company.

(g) To keep the warehouse properly equipped to handle traffic promptly.

Third: It was mutually agreed that freight not removed within the free time should be treated as stored with the warehouse company for account of the owners thereof.

Fourth: That no assignment of the agreement should be valid without the consent of the railroad company.

Fifth: That the agreement should remain in effect from the first of February, 1917, for twenty years.

Sixth: If the terms of the agreement should be found to work onerously it shall be subject to revision at the end of any period of two years and if the parties cannot agree upon such revision, it shall be submitted to arbitration.

The tariffs filed by the Pennsylvania Railroad in connection with the contracts, among other things provide (Record, pages 708, 697, 696):

Under consolidated freight classification No. 5, Rule 27, it is provided as follows:

> "Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

To this Rule 27, exceptions are established, as follows:

> "At Philadelphia, Pennsylvania, package freight carried at carload rates will be loaded or unloaded by the carriers at the stations in Philadelphia specified below except when handled direct to or from cars on team tracks at owner's request,"——

Exceptions are also made at other points. The tariff provided [G. O. I. C. C. #14322 Supplement No. 6 effective May 10th, 1926]:

> "Rule 32. Warehouses considered freight stations during free time.
>
> "In the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. #1491, P. S. C. —Pa. #86, Agent's Index #54 supplements thereto or re-issues thereof the following warehouses in Philadelphia, Pa., are considered freight stations during the free time,"

This is followed by a list of the several warehouses covered by the contracts above mentioned.

A large amount of testimony was taken before the Examiner of the Interstate Commerce Commission which is printed in the Record.

The Interstate Commerce Commission filed its report, a copy of which will be found (Record, page 143). In this report, Porter, Commissioner, says, at page 150:

> "Following McCormick Warehouse Co. v. Pennsylvania R. Co., *supra*, and upon this record, we find that

the practice of defendants in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as afore said, *and refusing to make similar allowances to complainants for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses.* It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia." (Italics ours.)

The Interstate Commence Commission on December 28th, 1929, issued its cease and desist order effective February 10th, 1930 (Record, page 151), afterwards made effective February 25th, 1930 (Record, page 176), whereupon the appellant filed its bill in equity in the District Court of the United States for the Eastern District of Pennsylvania against the United States of America and the Interstate Commerce Commission, wherein it prayed among other things that the Court should summon a Statutory Court in accordance with the provisions of the Act of Congress, approved October 22, 1913, 38 Statutes 220. U. S. Code Title 28, Section 47, and that the execution of said cease and desist order be stayed until the further order of the Court (Record, page 4).

On the presentation of said bill in equity to the Hon. J. Whitaker Thompson, Judge in said court he made an order dated February 17th, 1930, that United States Circuit Judge Victor B. Woolley, and United States District Judge Oliver B. Dickinson be called to his assistance

to hear and determine said application for a temporary stay and ordered the hearing thereof before said Court on 21st day of February, 1930, at 10:00 o'clock at Philadelphia (Record, page 15).

On February 21st, 1930, the Court made an order staying the execution of the said cease and desist order and fixing March 26th, 1930, for hearing on the merits (Record, page 18). On March 26th, 1930, decree filed amending decree of February 17th, 1930, by substituting the Honorable Joseph Buffington, Circuit Judge, in place of the Honorable Victor B. Woolley (Record, page 28). The said cause was heard by the said Court on March 26th, 27th and 28th, 1930. At the hearing the principal trade bodies of Philadelphia intervened in behalf of plaintiffs and the complaining warehouses intervened in behalf of defendants.

On April 15th, 1930, decree filed continuing temporary stay of order of Interstate Commerce Commission (Record, page 29). On October 8th, 1930, the Court dismissed appellant's bill in equity in an opinion by Thompson, J., concurred in by Dickinson, J. (Record, page 30), Buffington, C. J., dissenting (Record, page 43). On appellant's petition for appeal with supersedeas, the Court in a *per curiam* filed November 19th, 1930, granted such order fixing appeal bond in the sum of $2,000 which bond was entered and approved (Record, page 92). The said appeal is now pending for hearing in this court.

ASSIGNMENTS OF ERROR.

1. The District Court erred in dismissing the bill.

2. The District Court erred in refusing to enjoin the order of the Interstate Commerce Commission entered in the case of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company v. Pennsylvania Railroad Company.

3. The District Court erred in its Finding of Fact Number 1 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 1, the said Finding is as follows:

> "1. The plaintiff warehouses and the complainants before the Commission, who are intervening defendants in this proceeding, operate at Philadelphia warehouses, at and from which they ship and receive, load, unload, store, distribute, and deliver in small quantities carload lots of merchandise, known as 'package freight,' carried or to be carried at carload rates, which they have previously solicited for such handling from their customers located generally in cities outside of Pennsylvania. For those services they collect from their customers certain warehouse rates and charges."

4. The District Court erred in its Finding of Fact Number 4 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 4, the said Finding of Fact is as follows:

> "4. The carriers, The Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, and the Reading Company, pay to the plaintiffs, in connection with the loading, unloading, and 'handling' by them of such merchandise, certain sums, ranging from 30¢ to 50¢ per ton, but make no such payments to the warehouses which were complainants before the Commission. No payments are made if the shipments are unloaded within the forty-eight hours free time. The Pennsylvania Railroad Company pays the allowances in question to the Merchants Warehouse Company and the Quaker City Cold Storage Company, the Baltimore

and Ohio to the Pennsylvania Warehousing and Safe Deposit Company, and the Reading Company to the Philadelphia Warehousing and Cold Storage Company, the plaintiffs here. Payments are also made by the Reading to the Pennsylvania Warehousing and Safe Deposit Company."

5. The District Court erred in its Finding of Fact Number 8 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 8. The said Finding of Fact is as follows:

"8. The contract warehouses and the intervening warehouses are engaged in the same kind of business, and each ships and receives at its warehouse package freight of all kinds destined to or shipped from various points in the United States over the railroads, and the circumstances and conditions surrounding handling and movement of the traffic are similar if not identical."

6. The District Court erred in its Finding of Fact Number 9 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 9. The said Finding of Fact is as follows:

"9. The services which the contract warehouses perform, for which the contracts provide for the payment of compensation by the carrier to them are performed, for their patrons, by the intervening defendants who were complainants before the Commission; the latter load and unload the freight for their patrons, pay and collect freight charges, send notices of arrival to their customers, check the contents of the cars, give the railroads reports, notify the railroads of damage

to the freight, prepare bills of lading, mark and stencil packages, recooper and perform in general identical services for their patrons."

7. The District Court erred in its Finding of Fact Number 10 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 10. The said Finding of Fact is as follows:

"10. The warehouses of the plaintiffs and those of the intervenors are served by private side tracks or sidings connecting with the line of one or more defendants."

8. The District Court erred in its Finding of Fact Number 13 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 13. The said Finding of Fact is as follows:

"13. Concerns using public warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower charges than can the intervenors."

9. The District Court erred in its Finding of Fact Number 14, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 14. The said Finding of Fact is as follows:

"14. The contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question."

10. The District Court erred in its Finding of Fact Number 15 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 15. The said Finding of Fact is as follows:

"15. Traffic considerations have been the primary motive for the payment of these allowances."

11. The District Court erred in its Finding of Fact Number 16, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 16. The said Finding of Fact is as follows:

"16. The facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact open public stations, but are confined to the handling of merchandise for the patrons of the warehouses."

12. The District Court erred in its Finding of Fact Number 17, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 17. The said Finding of Fact is as follows:

"17. The services performed by the contract warehouses in connection with the loading and unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact, performed for the benefit of the owner of the merchandise rather than for the railroads."

13. The District Court erred in its Finding of Fact Number 18 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 18. The said Finding of Fact is as follows:

"18. The service rendered by the warehouses under the contracts is a trade service and not a transportation service."

14. The District Court erred in its Finding of Fact Number 19 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 19. The said Finding of Fact is as follows:

"19. While the contract warehouses are not the owners of the goods received or shipped by them, all of the dealings are with these warehouse companies, and none with the owners of the goods."

15. The District Court erred in its Finding of Fact Number 20 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 20. The said Finding of Fact is as follows:

"20. As to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots."

16. The District Court erred in its Finding of Fact Number 21 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 21. The said Finding of Fact is as follows:

"21. The contract warehouses, even though not the owners of the goods, have been given the dominion over such goods for transportation purposes, and ac-

cordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to the intervening warehouses, shipments from and to their warehouses being handled in substantially the same manner."

17. The District Court erred in its Finding of Fact Number 26 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 26. The said Finding of Fact is as follows:

"26. The practice of plaintiffs in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid and refusing to make similar allowances to intervenors for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants."

18. The District Court erred in its Finding of Fact Number 27 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 27. The said Finding of Fact is as follows:

"27. These contracts for the payment of the allowances are devices to attempt to lend legality to the payment of rebates to the contract warehouses."

19. The District Court erred in its Conclusion of Law Number 1, and in overruling the plaintiff's exception to that Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 1. The said Conclusion of Law is as follows:

"1. The payment of the allowances by the railroads.

in accordance with the contracts, is unlawful in that it subjects the intervening warehouses to unjust discrimination as against the contract warehouses."

20. The District Court erred in its Conclusion of Law Number 2, and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 2. The said Conclusion of Law is as follows:

"2. The payment of the said allowances gives an undue and unreasonable preference and advantage to the contract warehouses and subjects the intervening warehouses to an undue and unreasonable prejudice and disadvantage."

21. The District Court erred in its Conclusion of Law Number 3 and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 3. The said Conclusion of Law is as follows:

"3. The allowances paid to the contract warehouses are unlawful as rebates."

22. The District Court erred in its Conclusion of Law Number 4 and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 4. The said Conclusion of Law is as follows:

"4. The order of the Interstate Commerce Commission of September 28, 1929, is in all respects a lawful order."

23. The District Court erred in its Conclusion of Law Number 5 and in overruling the plaintiff's exception to that Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 5. The said Conclusion of Law is as follows:

"5. The petitions should be dismissed."

QUESTIONS INVOLVED.

First: Are the contracts between the Pennsylvania Railroad Company and the Merchants' Warehouse Company for loading and unloading freight cars discriminatory and inhibited as such under the provisions of the Interstate Commerce Act?

Second: Does the loading and unloading of freight cars by the Merchants' Warehouse Company under its contracts with the Pennsylvania Railroad Company give it such dominion over the merchandise loaded or unloaded as to constitute it a shipper of such merchandise within the meaning of the Interstate Commerce Act?

Third: Does the payment by the Pennsylvania Railroad Company to the Merchants' Warehouse Company of the agreed compensation for the services rendered by it in performing its obligations under the contracts aforesaid, constitute a rebate within the meaning of the Interstate Commerce Act?

Fourth: Are the services rendered by the Merchants' Warehouse Company under the terms of said contracts a transportation service within the meaning of the Interstate Commerce Act?

ARGUMENT.

The appellant's main proposition in this case is that the contracts in question require it to load and unload freight cars for the Railroad Company and to receive in payment for such transportation services the sums stipulated; that such contracts are legal obligations which are not discriminatory or prejudicial to the complaining warehouses within the meaning of the Interstate Commerce Act. In short the Railroad Company had a right to hire whomever it saw fit to render such services and because it did not hire the complaining warehouses to render similar services did not make the contracts in question illegal, notwithstanding the finding to that effect by the Interstate Commerce Commission.

There is no question of fact involved in this case. The fundamental facts are undisputed but the inferences to be drawn from these are radically different; as an example, the Commission finds (Record, page 148):

> "The contract warehouses, even though not the owners of the goods, have been *given dominion over such goods* for transportation purposes, and accordingly for transportation purposes *they should be deemed* the consignors of shipments from or consignees of shipments to their warehouses." (Italics ours.)

It is manifest on its face this is a deduction from the undisputed fact that the freight cars were placed in the custody of the warehouse company for the purpose of having freight loaded therein or unloaded therefrom. The use of the expression "given dominion over such goods" is also a deduction from the undisputed fact that the warehouse company was in possession of the goods for the purpose of performing the agreed services. In this connection it may be noted that the carrier had a like dominion over

the goods for the purposes of transportation and that this dominion was passed on to its agent for the purpose of unloading the freight cars. The carrier could have unloaded the cars with men on its own payrolls hired for the purpose, but it saw fit to hire the warehouse company to do it for them.

A finding based on inferences from uncontroverted facts has not the weight in an appellate court of a finding of fact.

Bianchi v. Vere, 17 Fed. 2d. 22.

On appeal in equity, appellate court is not bound by the trial Judge's finding of fact.

Wolf v. Minerals, 18 Fed. 2d. 483.

> "When the fact is merely a deduction from other facts reported by him (Master) his conclusion is simply a result of reasoning of which the Court is as competent to judge as he."
>
> *Phillips's Appeal,* 68 Pa. 130.

In *Hamilton v. Fay,* 283 Pa. 175 (1925), Mr. Justice Walling at page 179 cites *Phillips's Appeal* and kindred cases with approval.

In the *Tap Line Cases,* 234 U. S. 1, Mr. Justice Day says at page 22:

> "It is further insisted upon the authority of Proctor & Gamble Co. v. United States, 225 U. S. 282, and other cases in this court which have followed that decision, that in the present cases the decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute."

On this subject Circuit Judge Buffington in his dissenting opinion says (Record, page 51):

> "Indeed, the holding of the Commission can hardly be deemed a finding of fact, for it only is:
>
> 'The contract warehouses even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses.'
>
> "Being merely a deduction, this Court is at liberty to draw its own deductions and base its decree on its own view * * *"

He further says (Record, page 53):

> "Yet it is upon this false assumption of the warehouse being the consignee that this entire proceeding is bottomed. The Commission saw that the fact that the warehouse was the consignee was a prerequisite to their order and that unless such was the fact, the order here involved could not be sustained."

We submit, therefore, that the conclusions of the Commission in this case, and the like conclusions in the majority opinion of Judge Thompson in the Court below are not binding on this Court, being as they are in every instance, inferences or deductions from undisputed facts. They can only be sustained if they are well-founded in law. Whether they are or not will hereafter be further discussed.

There is no evidence in this record that impugns the good faith of either party to the contracts in question either in their procurement before execution or thereafter in their performance. If these contracts are illegal it is because the making of such contracts are prohibited by the provisions of the Interstate Commerce Act, and not because of anything done or omitted to be done in their performance. The adjudication of the Commission fully sustains this view.

THE FIRST QUESTION INVOLVED IN THIS RECORD IS:

Are the contracts between the Pennsylvania Railroad Company and the Merchants' Warehouse Company for loading and unloading freight cars discriminatory and inhibited as such under the provisions of the Interstate Commerce Act?

The language of Section 3 which will be found in U. S. Code, Title 49, Sec. 3, Subsection 1, at page 1654, is as follows:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The complaining warehouses in their petition to the Interstate Commerce Commission in paragraph VII averred (Record, page 116):

> "That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money."

Mr. Commissioner Porter in his adjudication (Record, page 150), finds:

> "* * * we find that the practice of defendants in mak-

ing allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid, *and refusing to make similar allowances to complainants for performing similar services results* in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants." (Italics ours.)

Because the carrier hired the Merchants' Warehouse Company to load and unload package freight at Philadelphia and did not hire the complainants to do so, it was guilty of unjust discrimination and granted an undue preference to it.

We submit there is nothing in the statute that deprives the carrier of the right to hire whomsoever it sees fit to render it a service. Undoubtedly when it hires one man and does not hire another it discriminates against the man it did not hire but that is not the kind of discrimination and preference which is forbidden by the statute. The language of the statute in dealing with the subject necessarily must be drawn in broad terms but we do not think it was the intention of Congress to deprive the carrier of the right to say whom it should or should not employ to render it service. If the carrier would allot an undue proportion of coal cars to one mining plant and refuse to make a similar allotment to another it would be unjust discrimination and undue preference. Instances might be multiplied, but it is unnecessary to do so.

The question of what is unjust discrimination has been considered and defined by this Court in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42. This is a leading case on the subject and is generally known as the *Peavey case*. In that case Peavey & Company were paid by the Union Pacific Railroad Company certain amounts for the elevation of grain at its elevators at which points the railroad company designated, under its tariff, that it would assume the cost of elevation. Complaint was made by other elevators who were not paid for like services, that this arrangement created unjust discrimination against them.

Mr. Justice Holmes says, at page 45:

> "Thus Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation and were to be paid for *notwithstanding the possibility that some advantage might be gained as a result.*" (Italics ours.)

The opinion further says, at page 46:

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary the Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them."

The pending case is even stronger than the *Peavey case* because Peavey was paid for elevating his own grain. The Merchants' Warehouse Company had no ownership in the merchandise it loaded or unloaded from the freight cars.

We submit that a carrier has full liberty to select its own agents to perform transportation services on its behalf which it is under legal obligation to perform and that it may employ its own agent exclusively and refuse to employ another.

Express Cases, 117 U. S. 1;
Chicago &c., R. R. v. Pullman Southern Car Co., 139 U. S. 79;
Covington Stock Yards v. Keith, 139 U. S. 128;
Donovan v. Pennsylvania Company, 199 U. S. 279.

In the *Donovan* case, Mr. Justice Harlan, at page 293, said:

> "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the

company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation."

Again, at page 296, Mr. Justice Harlan said:

"Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling. The defendants did not have or profess to have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent."

In *Great Northern Railway Company v. Minnesota*, 238 U. S. 340, Mr. Justice McReynolds, at page 346, said;

> "A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs."

THE SECOND QUESTION INVOLVED IN THIS RECORD IS:

Does the loading and unloading of freight cars by the Merchants' Warehouse Company under its contracts with the Pennsylvania Railroad Company give it such dominion over the merchandise loaded or unloaded as to constitute it a shipper of such merchandise within the meaning of the Interstate Commerce Commission?

Mr. Commissioner Porter in his adjudication finds (Record, page 148):

> "While the contract warehouses *are not the owners* of the goods received or shipped by them, all of defendants' dealings are with these companies and none with the owners of the goods. As to many of the inbound carload shipments the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they *should be deemed the consignors of shipments* from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner." (Italics ours.)

The adjudication shows on its face that the warehouse company was not the owner of the merchandise loaded or

unloaded from the freight cars. It is undisputed that the bills of lading for inbound freight were issued by a named consignor to a named consignee in care of the Merchants' Warehouse Company at one of the ten warehouses which would be most convenient for unloading the cars for the purpose of making delivery to the consignees (Record, page 337; Exhibit 80, Bound Volume of Exhibits filed under Stipulation of Counsel; see also Stipulation of Counsel, Record, page 233; see also Record, page 379).

The contract required the carrier to maintain railroad tracks adjacent to the warehouses and do the necessary shifting in delivering cars to the warehouse or taking them therefrom. Upon a loaded car being placed on the railroad track alongside of the warehouse platform, the employees of the Merchants' Warehouse Company then make a careful note of the condition of the seals of the car and keep a copy of the record, and the seals were broken, the car doors opened, and an unloading crew and checker took the goods out of the car package by package, keeping a careful record of the condition of each package as it is taken out of the car, and then the packages are loaded on "a small buggy or truck," and the freight was transferred to some convenient place in the warehouse, and held subject to the order of the consignee subject to unpaid freight charges. A report was made to the Pennsylvania Railroad Company as to the condition of the contents of the car and the consignee named in the billing was notified that the shipment was ready for delivery. The contents of the car were then held by the warehouse company under its contracts with the railroad company, subject to the order of the consignee for forty-eight hours free time, and were insured by the warehouse company. If the consignee did not take delivery within forty-eight hours, the contents of the car were stored in the warehouse subject to the order of the consignee, who thereafter paid to the warehouse company its proper charges for storage. If the consignee took delivery within forty-eight hours, the warehouse company delivered the contents of the car on its platform to the tailboards of

the trucks sent by the consignee or to parties to whom the consignee gave a written order for delivery. After the expiration of the forty-eight hours, the contents of the car remained on storage in the warehouse for the owner thereof, and were thereafter delivered upon his order. (See Record, pages 375 to 377.)

As an illustration of what is meant by the phrase "given dominion over such goods for transportation purposes," let us assume that a package of ketchup consigned from outside the State for delivery in Philadelphia to a named consignee in care of the Merchants' Warehouse Company, is unloaded by the Merchants' Warehouse; in the process of unloading it is negligently handled and the contents damaged. The owner of the goods thereupon presents a claim to the Pennsylvania Railroad Company for his loss and damage. The Pennsylvania Railroad Company could not defend on the ground that the goods had been delivered to the consignee and that they had been damaged by the agent of the consignee. It would be responsible for the loss and would undoubtedly pay it. Thereafter it could collect from the Merchants' Warehouse Company the amount of the damage under its contract with the Merchants' Warehouse Company to indemnify it for damage to the goods under clause (d) of its contract to indemnify the railroad company for damage to freight caused by it. No doubt it could similarly sue an employee on its own staff for negligence in performing his duty. The point we wish to emphasize is that the Merchants' Warehouse Company has "been given dominion over the goods for transportation purposes" by the Pennsylvania Railroad which has in no wise diminished its responsibility to the owner of the freight or lost its dominion over the freight so far as the owner thereof is concerned.

The testimony shows that what the contracts required to be done, was done, no more, no less. The cars were loaded and unloaded in the same way and manner as they would have been loaded and unloaded by the regular staff of the carrier's employees at other freight stations.

If we understand the Commissioner's view correctly, it is that because the carrier puts the car loaded with freight in possession of the warehouse company to be unloaded, it is thereby given a "dominion" over the contents of the car which transmutes it into a consignee of the merchandise. In this connection it is to be observed that in every bill of lading involved in this case a real consignee was named. The loaded car was shipped to this named consignee, in care of the Merchants' Warehouse Company at a designated warehouse.

Webster's Collegiate Dictionary defines a consignee as "one to whom something is consigned or shipped." Corpus Juris under the name of consignee says:

> "that person or corporation to whom a carrier may lawfully make delivery of consigned goods in accordance with its contract of carriage."

We submit the Commissioner uses the word "consignee" in the sense that the warehouse company was to be construed as the owner of the merchandise upon which freight rates had been paid and that to pay it for unloading cars was to give a rebate from the rate. We will discuss this under the third question involved. The Commissioner has not stated his view any too clearly but we think we have correctly stated his view.

It is further to be observed that the "dominion" arising from the possession of the loaded cars is the same dominion which the carrier had over them. Under the terms of the contracts the carrier's "dominion" is to remain in full force and effect until the free time has expired and the freight rate paid. This would be the same situation if the carrier had unloaded the cars into its warehouse by its own staff of employees.

We think the warehouse company is the carrier's agent to make delivery of the merchandise to the real consignee in fulfilment of its contract of carriage. This is the reasonable construction of the contracts in question. To call the warehouse company under such circumstances a consignee or consignor is an unreasonable and unjustifiable construc-

tion of the contracts and of the undisputed evidence as to the manner of performing the same.

The contracts required the warehouse company to load cars with outbound freight stored in their warehouses or brought to their warehouses for such purpose. From January 1st, 1928, to September 30th, 1928, at the various warehouses 744 cars of outbound freight were received from trucks or teams (Record, page 452). If the merchandise on storage was to be reshipped it certainly could be more conveniently handled by the warehouse company than by the carrier. There is no policy of law that forbids the carrier from hiring the warehouse company to load the outbound cars in lieu of sending their regular staff to do so. The Commissioner finds that the "dominion" given the warehouse company over the merchandise for the purpose of loading it into freight cars constituted it a consignor of such merchandise. He could, with equal accuracy, have held that the dominion given to the carrier to load the cars by its regular staff constituted it a consignor. Miscalling names does not alter facts.

Buffington, Circuit Judge, in his dissenting opinion said (Record, page 50):

> "We here take occasion to say that there is no proof whatever that in any case any of these contract warehouses was the actual consignee of the inbound carload freight delivered by them or the outbound lots shipped by them. The few isolated instances where they received pay for handling their own shipments were evidently oversights and were in violation of the railroad's ordered tariff provision that 'no payment will be made on any traffic consigned to or by the warehouse company.' So far as outbound freight was concerned, the proof is they simply received the freight from the shipper and shipped it as was done by the railroad freight agent at any of its other freight stations. In doing so they performed no service for the shipper and they did not make the use of their warehousing facilities a condition precedent to the shipper using the station. So far as inbound carload freights were concerned, the shipper, in order to advise the railroad

as to its particular destination, marked the car in care of such or such a contract warehouse. Far from designating or making the warehouse the consignee of his freight or authorizing the warehouse to receive the goods on his behalf and thereby discharge the railroad from liability, the shipper did nothing of the sort. On the contrary, the shipper retained his bill of lading and with the consequent right of stopping in transit, in no way surrendered or in any way qualified his ownership of his property and in fact did nothing by marking it in care of the warehouse, other than simply to show that the warehouse which the railroad by its contract made one of its freight stations was the particular railroad freight station to which he wished his goods to be forwarded. In point of fact, the sending it in care of the warehouse amounted to nothing more than if a shipper marked his freight 'in care of John Doe, Pennsylvania, freight agent at Bryn Mawr, Pennsylvania.' To our view, the finding of the Commission that this marking made the warehouse the consignee of the freight had not only no proof to support it and is not a finding of fact, but is a mere conclusion or inference for drawing which there was no warrant or foundation. And, to our view, the upholding of this theory of imaginary consigneeship of the freight would deprive consignors of freight of one of the most valuable rights a shipper has in surrendering the custody of his freight to a public carrier, namely, constituting the carrier as his agent—with the consequent right of transit stoppage, until the carrier has terminated such agency by delivering such goods to the consignee designated by the consignor. Moreover, to so hold is to ignore the fact that the consignor has named the consignee and has mentioned the warehouse not as the consignee but as one in whose care the shipment is made. The bill of lading must be construed as a whole and every part given effect, and to say the name of the designated consignee which is written into the bill of lading is to have no effect because the warehouse, which is not named as consignee, is to be 'deemed' the consignee because of the words 'In care of,' etc., is to violate a

basic rule of construction and to substitute fiction for fact."

* * * * * * *

Again he said (Record, page 52):

"Moreover, the inference of the Commission that the warehouse 'for transportation purposes should be deemed * * * consignee of shipments to its warehouses' is authoritatively negatived by the Bills of Lading Act, 39 Stat. 545, Sec. 42 (49 USCA Sec. 122), which provides 'consignee' means the person named in the bill as the person to whom delivery is to be made. It will also be noted that the present holding of the Commission that the warehouse has 'been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed consignors and consignees,' is at variance with the principle announced by its own holding in Smokeless Fuel Co. v. Norfolk & Western R. Co., 85 I. C. C. 395, which said: 'The law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped.' This reasonable and common sense view has the approval of textbook authorities. See Hutchinson on Carriers (3d Ed.) Vol. 2, page 755, where it is said:

"'Goods shipped to one person as consignee in care of another should be delivered to the consignee, and, in case he cannot be found then to the one in whose care they are shipped.'

"It is obvious that a railroad by undertaking performance of transportation does not by performing such transportation duties become the consignee of the goods. And if such is the case, how does the hiring by the railroad of some one else to perform a part of the railroad's services make such minor performer the consignee where the same acts, if done by the railroad, would have no such effect."

Even if the warehouse company had been the owner of the merchandise shipped it would have been entitled to reasonable compensation for any transportation services rendered

to the carrier in handling the same under the provision of Section 15 of the Interstate Commerce Act, U. S. Code, title 49, sub-Sec. 13, at page 1662.

It was under the provisions of this section that Peavey was allowed compensation for elevating his own grain in his own elevator. *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 45.

In the present case the reasonableness of the compensation was not questioned, possibly because the Commission was more interested in establishing that the warehouse company must be treated as a consignor or consignee of the property handled as a basis for the contention that to pay one shipper for services and not pay another shipper for similar services was an illegal discrimination. This is more or less speculation, because the definition by the Commission of who is a consignor or consignee is not well founded or a reasonable inference or deduction from the undisputed evidence in the case.

THE THIRD QUESTION INVOLVED IN THIS RECORD IS:

Does the payment by the Pennsylvania Railroad Company to the Merchants' Warehouse Company of the agreed compensation for the services rendered by it in performing its obligations under the contracts aforesaid constitute a rebate within the meaning of the Interstate Commerce Act?

The Commissioner finds on this subject (Record, page 150):

> "The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses."

There is no evidence in the record of any kind that any payment was made to the warehouse company out of any freight rates paid to the carrier for the transportation of the merchandise loaded or unloaded by the warehouse company. Nor is there anything in the cease and desist

order of the Commission (Record, page 151) on the subject of rebates. The finding is a reason given in support of the finding that the contracts between the carrier and the warehouse company for loading and unloading freight cars is discriminatory because the carrier refused to make similar allowance to the complainants for performing similar services (Record, page 150). The word "rebate," when used in connection with the payment of freight rates, is an opprobrious epithet and when its use is justified it rightly casts discredit on any transaction it touches. In the present case the Commissioner justifies the use of the epithet by finding that the warehouse company was either the consignor or the consignee of the merchandise loaded or unloaded in or from the cars and, therefore, to pay such consignor or consignee for such services was to grant a rebate. We submit that such reasoning is far from satisfactory. It falls far short of establishing a rebate; nor do we think it was ever intended to establish the fact that the payments for the services incident to loading and unloading of freight cars were in fact rebates. If the loading and unloading of freight cars is a transportation service, as defined by the Act of Congress, which we will, under the next head of our brief, endeavor to show that it is, then it is a service which it is the duty of the carrier to perform and is one which it can perform by its own hired employes or can hire the warehouse company to do it for them. As a necessary consequence the reasonable price paid for the performance of such services can never be a rebate.

THE FOURTH QUESTION INVOLVED IN THIS RECORD IS:

Are the services rendered by the Merchants' Warehouse Company under the terms of said contracts a transportation service within the meaning of the Interstate Commerce Act?

In Section 1 of the Interstate Commerce Act, U. S. Code, Title 49, sub-section 3, at page 1651, it is enacted:

"The term 'transportation' as used in this chapter shall include * * * all services *in connection with the receipt, delivery,* elevation and transfer in transit, ventilation, refrigeration or icing, *storage and handling* of property transported." (Italics ours.)

The tariffs filed by the Pennsylvania Railroad Company carry out its contracts with the Merchants Warehouse Company as follows (Exhibits 59, 60, Record, page 693):

The Consolidated Freight Classification, #5, Rule 27, reads (Record, page 708):

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

To this rule the railroad company established "Exceptions to Official Classification" being GO-ICC #14370 as follows (Exhibit 61, Record, 697):

"at Philadelphia, Pa.

Package freight carried at carload rates will be loaded or unloaded by the carriers at the stations in Philadelphia specified below, except when handled direct to or from cars on team tracks at owner's request.

Vine Street
Walnut Street Wharf
Dock Street
Federal Street
Broad Street and Washington Avenue
30th & Market Streets
Shackamaxon
Kensington
Ontario Street
Fair Hill
North Philadelphia proper (not to include Diamond Street Yard or 12th Street Yard)

Hay carried at carload rates will be loaded and/or unloaded by the carrier at the Hay Warehouses in Philadelphia, Pa., enumerated in G. O.—I. C. C. No. 14322, G. O.—P. S. C.—Pa. No. 4813 (Agent's Index No. 17), supplements thereto or reissues thereof."

By Pennsylvania Railroad Company's local freight tariff G. O.—I. C. C. #14322 Supplement No. 6 effective May 10th, 1926, it is provided (Exhibit 60, Record, 696):

> "Rule 32. Warehouses considered freight stations during free time.
>
> "In the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. #1491 P. S. C. Pa. #86, Agent's Index #54, supplements thereto or re-issues thereof, the following warehouses in Philadelphia, Pa., are *considered freight stations during the free time.*" (Italics ours.)

This is followed by a list (Record, page 696), naming the ten warehouses of the Merchants' Warehouse Company in the City of Philadelphia which are described in the nine contracts printed in the Record, pages 455 to 526.

Under these tariffs, in consideration of the freight rates published therein, the Pennsylvania Railroad Company agrees that package freight carried by it "at carload rates will be loaded or unloaded" by it "at the stations in Philadelphia" specified in its tariffs.

The Commissioner does not express any opinion on the subject of whether or not services rendered by the warehouse company in loading or unloading freight cars under the terms of the contract were "transportation" services. He apparently concedes that they were, for he presents a series of excuses for not paying for them. He says (Record, page 147):

> "Among other things, the record is pursuasive that the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations but are confined to the handling of merchandise for the patrons of the warehouses; and that the services performed by the contract warehouses in connection with the load-

ing or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact, performed for the benefit of the owner of the merchandise rather than for defendants."

The services were rendered, thousands of cars were loaded and unloaded every year under the terms of the contracts. Why should they not be paid? The laborer is worthy of his hire without regard to the motives that may have induced him to render his services. The warehouse company may have solicited consignments in their care; the more cars they unloaded the more money they earned. Why should they not do so? There is no law against individual enterprise. The hope of reward is a great stimulus to business endeavor and should be encouraged and not criticised or its motives impugned. We think the comments of the Commissioner were irrelevant. The question before the Commission was, were the services rendered transportation services? If they were, then, unless the contract was illegal, common honesty required that the carrier should pay the agreed price and all else is beside the question.

In the *Peavey case*, 222 U. S. 42, the Court holds that elevation referred to in Section 1 of the Act is a transportation service. In the same section, *receipt, delivery and handling of property transported* is made a transportation service.

Under sub-Section 4 of Section 1 the Act requires the carrier "to provide and furnish such transportation upon reasonable request therefor." So that we insist that under Section 1 of the Act to regulate commerce, the services rendered by the Merchants' Warehouse Company under its contracts with the Pennsylvania Railroad Company are transportation services which the carrier is required to furnish. This view is affirmed by the Supreme Court in the *Peavey case*, Holmes, J., saying, at page 47:

"As the carrier is required to furnish this part of

the transportation upon request he (Peavey & Co.) could not be required to do it at his own expense."

Again at page 46, Mr. Justice Holmes says:

"On the contrary the Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported or uses instrumentalities furnished by the latter he shall pay for them."

Which means that the carrier under its tariffs has assumed the services of loading and unloading, receiving and delivering freight at the warehouse stations published in its tariffs, which it was required under the Act to Regulate Commerce, and under its tariffs, to furnish and that there is nothing in the Act which prevents the carrier from "hiring the instrumentality" for the performance of such services "instead of owning" the same. It being the obligation and duty of the carrier to load and unload package freight carried at carload rates at the stations in Philadelphia, whether or not it rendered these services by its regular staff of employees on its payroll or hired the warehouse company to do it for them, can make no possible difference.

In *United States v. Baltimore & Ohio Railroad Company*, 231 U. S. 274, it is held:

"Premises occupied and used by a common carrier as a depot or freight station may become such through contract with the owners and not necessarily by lease or purchase."

"A carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; and if the amount is reasonable it is not a prohibited *rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor.*" (Italics ours.)

Mr. Justice Lurton, at page 287, says:

"That the plain purpose of the contracts between

the several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance."

The *St. Louis Terminal* Case, 34 I. C. C. 453 illustrates the situation in the present case. In St. Louis the eastern railway lines had terminals in East St. Louis only,

"and in order to offer the public a service that was sufficiently prompt to enable those lines to secure their fair proportion of the traffic, they were compelled to make arrangements with the companies hereinbefore referred to as transfer companies, to move the freight by wagon between St. Louis and East St. Louis. As a part of the arrangement, the transfer companies undertook also to furnish and operate stations in St. Louis where they could receive and deliver freight for the carriers" (Page 456).

"These freight stations in St. Louis, hereinafter often referred to as 'off-track' stations because they are not reached by the rails of any carrier, are in buildings owned or leased by the transfer companies and are operated by the transfer companies as agents of the carriers" (Page 457).

In these buildings the transfer companies also transacted the business of warehousemen and for their services in receiving and delivering freight and transferring the same by wagon to East St. Louis or from East St. Louis to the "off-track" stations, the railway companies paid the transfer companies. Other transfer companies complained that this payment was a discrimination against them. It appeared in that case, at page 457, that

"this arrangement was made by the carriers only with such transfer companies as had warehouses that could be used as freight stations."

The first question raised in the case was, whether the railway companies could lawfully operate these "off-track" stations and it was held by the Commission that there was nothing unlawful in their doing so, citing *United States v. Baltimore & Ohio Railroad Co.*, 225 U. S. 306, and the Commission said, at page 462, citing the case of *Interstate Commerce Commission v: Peavey*, 222 U. S. 42, and *United States v. Baltimore & Ohio Railroad Co.*, 231 U. S. 274:

> "We must hold that the advantage enjoyed in their private capacity by the warehousemen conducting the 'off-track' stations for the respondents, is incidental and not undue, under the Act to Regulate Commerce as amended. These conclusions rest upon the fact that the 'off-track' stations are in good faith kept open to all shippers as public freight stations of the carriers, this being the test applied in United States v. B. & O. R. R. Co., *supra.*"

Likewise the designated warehouses of the Merchants' Warehouse Company, as stations for the receipt and delivery of carload freight by the Pennsylvania Railroad Company are, under the contracts and tariffs, in good faith kept open to all shippers desiring to use the same for the loading, unloading, receipt and delivery of freight transported or to be transported over the Pennsylvania Railroad Company.

We, therefore, conclude on this point that the services rendered by the Merchants' Warehouse Company under its contracts with the Pennsylvania Railroad Company are "transportation services" that under its tariffs and the Act to Regulate Commerce, the Pennsylvania Railroad Company is required "to provide and furnish such transportation upon reasonable request therefor." That the Merchants' Warehouse Company also conducts the business of a warehouseman at its several warehouses in Philadelphia is immaterial, and while it has an incidental advantage by reason of its performing the transportation services under employment from the Pennsylvania Railroad Company, this does not render the contract with the Pennsyl-

vania Railroad Company and the arrangement thereunder, unlawful, and such advantage is "incidental, and not undue, under the Act to Regulate Commerce as amended." This conclusion is amply sustained by the *Peavey* or *Diffenbaugh* case, the *Baltimore and Ohio* case and the *St. Louis Terminal* case above referred to.

In what other way could the carrier designate a warehouse as a freight station than the one adopted in this case, that is by designating the named warehouse as a freight station in its filed and published tariffs.

It is a public freight station if the public have a right to demand service of it. After the carrier has thus designated a warehouse as a freight station, can any one doubt the right of the public to demand service of it? It is not the extent of its use by the public that makes it a public freight station but the fact that the carrier has so designated it.

In the *Tap Line Cases*, 234 U. S. 1, Mr. Justice Day says at page 24:

> "But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character."

Where its freight stations must be located is a question for the carrier to determine, at least, in the first instance. It would be for the carrier's interest to locate the stations where they would best serve the convenience of its patrons. There has been no complaint in this case of the location of the stations. The complaint in this case is that it does not make every other warehouse in the City of Philadelphia equally well equipped to perform the duties, a freight station.

If the Commission's view, that to hire one warehouseman and refuse to hire another is unjust discrimination, is to

be sustained, it would seem that the carrier had no option in determining who should be its agents, who should collect its freight rates, who should be responsible to it for the delivery of the merchandise carried to the persons entitled to receive it. An agent is a fiduciary, yet the carrier is to have no voice in selecting him. We submit this never was the law and never will be.

The good faith of the establishing of these several freight stations by the Pennsylvania Railroad for the convenience of the public in the City of Philadelphia, is fully shown by the testimony introduced in this case. We would particularly refer to the testimony of Mr. Edmund Funck, Assistant General Freight Agent of the Pennsylvania Railroad, testimony beginning at Record, page 318, and to that of Mr. Hubert J. Horan, President of the Commercial Exchange of Philadelphia, beginning at Record, page 404.

Originally railroad tracks were laid on Market Street and extended east to Eighth Street. There were tracks also on North Broad Street. Warehouses were located on both sides into which switch tracks were extended by which freight cars were delivered to the consignees for unloading and loading. When the tracks were removed from Market Street and North Broad Street the warehouses theretofore served by them were left without railroad connection and the freight intended for such warehouses had to be hauled by teams from the freight stations to the warehouses. This resulted in the stations becoming congested with freight and thereupon the Merchants' Warehouse Company was incorporated, the majority of stock in which was owned by the Pennsylvania Railroad Company. The warehouse was built in 1887 and freight cars delivered to it and unloaded by the warehouse company for the railroad company and contents stored in the warehouse for the account of the consignee, who at the beginning had ten days' free storage. As the city grew in size and business increased the railroad company, from time to time, established new freight stations in convenient localities for mak-

ing deliveries of freight to its patrons and receiving freight from them for transportation. These freight stations were established along the Delaware River front from Front and Berks Streets to Federal Street, about three miles, in the center of the City, 15th and Carpenter Streets, and in West Philadelphia at Thirty-first and Chestnut Streets. The warehouses in which these freight stations were established were either built or purchased by the Merchants' Warehouse Company, except in four instances, namely Federal Street stores, Thirty-first and Chestnut Streets, Front and Berks Streets and 15th and Carpenter Streets, which were owned by the railroad company and leased to the warehouse company. Whether the warehouses were owned or leased, they were operated under contracts substantially similar and in the same way and manner as they had been since 1887 when the first of the warehouses was erected and operated by the Merchants' Warehouse Company.

Buffington, Circuit Judge, in his dissenting opinion said (Record, page 53):

> "That the railroad may by contract constitute a warehouse a public freight station is as said by Supreme Court in United States v. Baltimore & Ohio Railroad, 231 U. S. 288, 'too clear for extended discussion.' If, then, such contract for substitution can legally be made, does it follow that because such a substitution is made with one warehouse and it is made a public freight station, that thereby the railroad has bound itself to establish as its additional public freight stations all other warehouses in that vicinity? We think not, for, as said in 276 U. S. 518, 'The grant of privileges to respondent creates no duty on the part of the railroad company to give like privileges to others and therefore there is no illegal discrimination.'"

Again (Record, page 54):

> "Commenting on the freedom of railroads to control its passenger stations, the Supreme Court in Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 194, said: 'There was no duty upon petitioner (the railroad) to accord to other taxicabmen the use of its lands

simply because it had granted Welsh the privileges specified in its contract with him.' And in another case (Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.) involving a similar question, the Supreme Court, in the same volume, at page 529 said: 'There is here no complaint by or on behalf of passengers; no lack of service, unreasonable exaction or inconvenience of the public is shown. It would be unwarranted and arbitrary to assume that this contract is contrary to public interest. The grant of privileges to respondent creates no duty on the part of the railroad company to give like privileges to others and therefore there is no illegal discrimination.' Now, if such contract as here involved be made, if there be no sinister purpose in making it, if its performance be an aid to the railroad in the movement of freights, if the public can avail themselves of this added facility, and the warehouse in good faith performs the part of the railroad in receiving and forwarding for all shippers alike their carload shipments, it would seem that such contracts and performance under them constitute a valuable and desirable aid to the railroad in the performance of its duty to transport."

In *Terminal Warehouse v. United States*, 31 Fed. 2nd 951, the Commission held in their first report that the allowances paid to the terminal company for loading and unloading of carload package freight at Baltimore and refusing to employ other warehouse companies to perform similar services were not unjustly discriminatory, unduly preferential or prejudicial, 95 I. C. C. 301. At a further hearing, however, the Commission reversed itself and held such allowances were discriminatory and thereupon issued a cease and desist order. *McCormick v. Pennsylvania Railroad Co.*, 148 I. C. C. 299.

The opinion of the Court follows along the lines of the Commission's adjudication, giving exactly the same reasons for sustaining the order that the Commission gave for making it. It casts no new light on the subject. It follows the same line of reasoning that the Commission did in the Peavey and Arbuckle cases.

Judge Soper at page 957 says:

"The contention of the Terminal Warehouse Company is that the Commission's order is wrong, because the Warehouse Company has been designated in the tariff as a public station of the carrier, and hence in this place the carrier is obliged, under the exception of rule 27, to load and unload carload freight, and may employ and pay the Terminal as its agent to do the work. *But the conclusion to which the Commission came destroys the essential premise upon which this argument is based; for it found that the Terminal Warehouses, although nominally open to the general public, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to render some warehouse service.* We are bound by this conclusion of fact, if it is supported by substantial evidence. Anchor Coal Co. v. U. S. (D. C.) 25 F. (2d) 462, 471. In our opinion, the evidence not merely supports but requires, the conclusion which the Commission has reached. It is true that 20 per cent of all carload package freight, shipped to Baltimore over the Pennsylvania, is handled by the Terminal Warehouse, and that any shipper desiring warehouse facilities, may send his goods to its platform. But these circumstances do not constitute the warehouse a public station. It is not used by shippers or consignees, who do not require or desire the services of the Terminal Warehouse Company, and either do not make use of any warehouse, or send their goods to other warehouses of a private or public character. The distinction between this situation and that in the case of U. S. v. Baltimore & Ohio Railroad, 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 218, upon which the complaint relies, is obvious; for there the premises used by the carrier as a freight station, although furnished and operated by a nearby shipper, who used it to a greater extent than any other shipper, was nevertheless open to all shippers and actually used for the benefit of all alike." (Italics ours.)

This is the first case we have found in which the ruling of the Commission that the paying of compensation by the

carrier for transportation services to a warehousing company without making a similar allowance to warehouse companies generally were discriminatory, has been sustained by a law court. The history of the subject shows that in the *Peavey* case, 222 U. S. 42 (1902), the Commission, 10 I. C. C. 309, upheld the contract including an allowance for Peavey & Co.'s own grain. By 1907, upon a rehearing, it cut down the allowance from one and one-half cents a bushel to three-quarters of a cent, estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate. 12 I. C. C. 85. The following year the Commission took the last step and ordered the carrier to desist from paying any allowance on grain in which they have any interest or that has been mixed, treated, weighed or inspected in their elevators. 14 I. C. C. 315. This cease and desist order was enjoined in the District Court of the United States and on appeal affirmed by the Supreme Court, 222 U. S. 42, Mr. Justice Holmes saying at page 46:

> "We agree with the Court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue."

The statement in the opinion in the Baltimore case that the station was not used by shippers or consignees who do not require or desire the services of the Terminal Warehouse Company, does not apply to the pending case because in the pending case the undisputed evidence shows that 744 cars of outbound freight loaded between January 1st, 1928, and September 30th, 1928, were brought to the station by wagon or truck and loaded directly into the freight cars by the warehouse company, which had had no previous connection with the loaded merchandise whatsoever. What the Commission has to say on this subject will be found at Record, page 148, but there is no finding that the loading of outbound freight is confined to merchandise *to which warehouse services had been rendered*. The exact finding is: "are confined to the handling of merchandise

for the patrons of the warehouse," which is a very different thing. Every railroad station has its patrons; they are those who use it for shipping or receiving freight.

Judge Soper in his opinion says that the distinction between the Terminal case and the Arbuckle case "is obvious." In the Arbuckle case the premises, though furnished and operated by a nearby shipper who used them to a greater extent than any other shipper, were *nevertheless open to all shippers* and actually used for the benefit of all alike. Judge Soper had previously pointed out that the Commission had found that the Terminal warehouse facilities were exclusively used by persons who used warehouse service. Our case thus resembles the Arbuckle case and differs from the Terminal case, because here also we have the public actually using the warehouse company freight station without employing any warehouse service whatever, thereby essentially differentiating it from the Terminal case.

In *United States v. Baltimore & Ohio Railroad Company,* 231 U. S. 274, sometimes mentioned as the "Arbuckle case." Mr. Justice Lurton at page 280 says:

> "The order of the Commission required the railroad companies to cease and desist from paying such allowances 'while at the same time paying no such allowance to the Federal Sugar Refining Co.' on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 I. C. C. 200."

At page 282, the Court further says:

> "The 'allowance' to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street Terminal and for the lighterage of all freight between that station and the railroad terminals on the New Jersey shore."

The order of the Commission was enjoined.

The very extensive use which shippers made of the warehouse freight stations of appellant is shown by the amounts paid by the Pennsylvania Railroad Company to appellant for loading and unloading freight cars at them. The aggregate for the four years 1926, 1927, 1928 and 1929 was $572,332.03, or an average of $143,083 per year (Record, page 179). There was no evidence in the record of the actual number of cars loaded and unloaded in each or any year. There was evidence, however, that between January 1st, 1928, and September 30th, 1928, 744 cars were at the various warehouses loaded with outbound freight received from trucks or teams (Record, page 452). The rate of payment for loading or unloading cars is thirty-five or fifty cents per ton, which would mean not less than 300,000 tons were handled in and out in an average year; this, at 30 tons per car, would mean at least 10,000 cars were loaded and unloaded per year. It is in evidence in this record (Richardson, page 386) that of the cars unloaded, thirty-five per cent at some warehouses and seventy-five per cent at other warehouses were delivered to the consignee within the forty-eight hours' free time.

On this subject Buffington, Circuit Judge, further said (Record, page 56):

> "Indeed, as we sense this case, the decisive question is whether these warehouses were in good faith made public freight stations by the railroad and whether the warehouses have honestly and in good faith and reality acted as public freight stations in the receipt of outgoing and the delivery of incoming freight. That test was clearly pointed out and made the decisive factor in the Baltimore case. Terminal Warehouse Co. v. U. S. (D. C.), 31 Fed. (2d) 951, 957. A study of that case shows that the warehouses were designated in the tariff sheets as public freight stations, but in the proofs it was shown in that case, as Judge Soper says, 'that the Terminal Warehouses, although nominally open to the general public, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to render some warehouse service.' In other words, the railroads and warehouses

in that case compelled the shipper to submit to the warehouse storage charges if he used the station. In the present case no such condition exists. The shipper simply ships and the warehouse simply receives and forwards the freight thus received without compelling any, or even contracting for any, precedent storage. In the present case any outbound shipper desiring storage or shipment, if he so desires, and any shipper not desiring warehouse facilities, may use the warehouse simply as a freight station. That the Baltimore case was decided on facts radically different from the crucial facts in this case is clear from Judge Soper's language, on page 957 of 31 F. (2d)."

The public trade bodies in Philadelphia have intervened in these proceedings to express their approval of the practice. They are represented by separate counsel who will file a brief in this court. The record shows that the three great railroad systems entering Philadelphia, the Pennsylvania, the Reading and the Baltimore and Ohio have the same practice on the subject. There is not any evidence in the record that impugns the good faith of the making of the allowances in question. No shipper has intervened to complain of or object to them in any way or manner whatsoever. The only objectors are four rival warehousemen and it would appear that their attitude to the subject is that if they can't have the allowances for themselves they will do what they can to prevent any other warehouseman getting them and to accomplish this they would destroy a system that has been in operation for over forty years to the entire satisfaction of the shippers of Philadelphia. We have not overlooked that the Commission say that the practice is a device to give a rebate but this is an unjustifiable inference or deduction from the testimony and the contracts. The fundamental proposition in this case is that in the opinion of the Commission it is discriminatory for the carrier to designate the warehouse of one company as its station and agent therein and not do the same for every other warehouse in the City of Philadelphia.

COMMENTS ON OPINION OF THE COURT BELOW.

The opinion of Thompson, J., concurred in by Dickinson, J., will be found in Record, page 30. It is a restatement of the findings of the Commission. It adds nothing to them. To discuss it in detail would only be to repeat what we have heretofore said on the same subjects. If the Commission was right in its conclusions so also is the Court below. There are however several matters to which we wish to call attention.

Judge Thompson said (Record, page 32):

> "No payments are made if the shipments are unloaded within the forty-eight hours free time."

This statement has no foundation in the Commission's adjudication or in the evidence: under the provisions of the contracts the warehouse company was to be paid for all cars loaded or unloaded by it. It is difficult to determine what the Court had in mind in making this statement unless it was accentuating and reenforcing the statement elsewhere made that the warehouse company rendered no transportation services except to merchandise to which it rendered storage service. If this is what the Court had in mind then it was mistaken as the provisions of the contracts in question will establish.

Judge Thompson further said (Record, page 36):

> "The original contracts which the Commission has declared discriminatory and prejudicial had their origin when there was nothing unlawful in contracts or arrangements between interstate carriers and the shipping public in making such allowances or deductions out of freight rates as have since been denounced and made unlawful by existing law. *So that the question before the Court is not whether the system set up was ethically bad but whether it is condemned by the law as it now is.*" (Italics ours.)

We think this excerpt from the learned Judge's opinion fairly expresses his attitude of mind toward the whole

case. Fairly interpreted we think he means that there was nothing ethically wrong in the contracts or in their performance but that such contracts under the provisions of the Interstate Commerce Act are illegal. In the final analysis that is the fundamental question in this case. We contend that the contracts in question are legal and the Court below holds them to be illegal. It is for this Court to determine whether or not the Court below was right.

The view taken by the Court below, as it appears to us, is that because the complaining warehousemen are equipped to load and unload package freight to and from cars it is discriminatory on the part of the carrier to hire the appellant to do such loading and unloading for them while at the same time it refuses to hire the complaining warehousemen to perform a like service. We submit that the carrier was well within its legal rights in so doing and that such discrimination, if it is to be so held, is not prohibited by the Act of Congress on the subject.

THE JURISDICTION OF THE COURT BELOW.

The jurisdiction of the Court was not questioned in the court below, but we are advised that the question will be raised in this court. The point to be urged is, as we understand it, that since the carriers are not parties to the suit, the warehouse companies have no status to petition for an injunction of the Commission's orders. The reliance of the Government will be on *Sprunt & Son v. United States*, 281 U. S. 249.

This case is quite different from the Sprunt case. Sprunt was a shipper not named in the Order, who relied on rights alleged to arise under the Interstate Commerce Act. The Order which we seek to have enjoined, however, provides in terms that the railroad companies (which are specifically named in the Order) shall not pay the amounts of money which the railroads have contracted to pay them. The warehouse companies' rights arise not under the Interstate Commerce Act, but independent thereof and all the warehouse companies ask of the Commission is to be let alone.

In its Opinion in the Sprunt case, this Court distinguished four earlier cases of suits to enjoin an order of the Commission by persons other than the carriers affected, saying (p. 257):

> "In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

A footnote points out that in two of these cases (*Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, and *United States v. Hubbard*, 266 U. S. 474), the right affected arose out of contracts. That is precisely the right these appellants are seeking to protect.

A vital point in the Sprunt case was that the carriers, accepting the Order of the Commission, published the rates complained of, thereby making moot the issue before the Commission. In that case, no stay of the Order of the Commission pending the appeal was granted or sought, and the Order was in effect at the time the case came before this Court. In the present case, however, such a stay has been sought and granted, and the Order is not in effect. The case, therefore, is not moot.

Under such circumstances, it would seem to be immaterial whether the railroads are or are not satisfied with the Order. The important point is that they have not taken any action to change their tariffs or to do anything in derogation of their contractual obligations to the appellants. If they are satisfied with an Order which would relieve them from their contractual obligations, they are, of course, under no obligation to ask the Court to enjoin such an order or to enter this litigation as parties plaintiff. Inasmuch as they have shown no disposition to refuse to perform their contractual obligations unless and until prevented from doing so by the Commission, there is no occasion to join them as parties defendant. We have no quarrel with the railroads. We require no Court order with regard to them, and therefore to join them as defendants would be unnecessary and vexatious.

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